SUPREME COURT, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 431

OCTOBER TERM 1968

HERMAN W. BECKER,
Appellant

v.

COMMONWEALTH OF VIRGINIA,
Appellee

Appeal from the Supreme Court of Appeals of Virginia—at Richmond

JURISDICTIONAL STATEMENT

Submitted by:
HERMAN W. BECKER
Appellant
4637 Valley Forge Lane
Virginia Beach, Virginia

WILLIAM E. CULVERHOUSE and
GARLAND M. LAYTON
Attorneys for Herman W. Becker
P. O. Box 5211, Bayside Station
Virginia Beach, Virginia

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JURISDICTIONAL STATEMENT

Now comes the Appellant, Herman W. Becker, and sets forth his Jurisdictional Statement as follows, to-wit:

There are no official or unofficial reports of opinion delivered in the courts below.

This is an Appeal to the Supreme Court of the United States from the final order of the Supreme Court of Appeals of Virginia affirming the judgment of conviction rendered by the Circuit Court of the City of Virginia Beach, Virginia, on the 15th day of November, 1967, and rejecting and refusing appellant's writ of error

and supersedeas, said final order being entered herein on April 24, 1968. Notice of Appeal was filed in the Circuit Court of the City of Virginia Beach on July 23, 1968.

This Appeal is taken pursuant to and jurisdiction is conferred by 28 U.S.C. 1257 (2).

The following cases sustain the jurisdiction conferred by the aforesaid statute:

Winters v. *People of State of N. Y.*, N. Y. 1948, 68 S.Ct. 665

Deloach v. *Rogers*, C.A. Ga. 1959, 268 F.2d 928

Miller v. *Schoene*, Va. 1928, 48 S.Ct. 246

Local 33B. United Marine Division of Intern. Longshoremen's Ass'n (A.F.L.) v. *Battle*, D.C. Va. 1951, 101 F.Supp. 650, 72 S.Ct. 178

Horwitt v. *Horwitt*, 90 F.Supp. 528

Hammerstein v. *Superior Court of Cal., in and for Los Angeles County*, Cal. 1951, 71 S.Ct. 521

Hague v. *Committee for Industrial Organization*, N. J. 1939, 59 S.Ct. 954

Appellant was convicted of violating Section 18.1-319 of the Code of Virginia, as Amended 1950, Vol. 4, at page 297:

"18.1-319. Betting on games, races, etc.—No person shall:

(1) Occupy any room, shed, tenement or building, or any part thereof, or any place upon any grounds, with books, apparatus or paraphernalia for the purpose of recording or registering bets or wagers or of selling or making books, pools or mutuals upon the result of any game, athletic contest or any trial of speed or power of endurance of animals or beasts,

(2) Being the owner or lessee or occupant of any room, tent, tenement, shed, booth or building or part thereof, knowingly permit the same to be used or occupied for any such purpose, or therein keep, exhibit or employ any device or apparatus for the purpose of recording or registering such bets or wagers or the selling or making of such books, pools or mutuals,

(3) Become the custodian or depository for gain, hire or reward of any money, property or thing of value bet or wagered or to be wagered or bet contrary to the provisions of this section,

(4) Receive, register, record, forward or purport or pretend to forward to or for any game, athletic contest or any race course any money, thing or consideration of value offered for the purpose of being bet or wagered upon any game or athletic contest or the speed or endurance of any animal or beast,

(5) Occupy any place or building or part thereof with books, papers, apparatus or paraphernalia for the purpose of receiving or pretending to receive, recording, registering or forwarding, or pretending or attempting to forward, in any manner whatever, any money, thing or consideration

of value bet or to be bet contrary to the provisions of this section, or

(6) Aid, assist or abet at any race track or place in any manner in any of the acts forbidden by this section.

Any person violating the provisions of this section shall be fined not less than two hundred nor more than one thousand dollars and be imprisoned not less than thirty days nor more than ninety days.

But nothing in this section shall be construed to prevent agricultural associations and riding and driving clubs or associations from offering a purse or premium at such trials of speed of animals or beasts as may be held by them."

QUESTIONS PRESENTED

1. Whether Section 18.1-319, Code of Virginia, as Amended, 1950, the statute under which appellant was charged, is so vague, indefinite and ambiguous as to be repugnant to and in violation of the appellant's rights as guaranteed under the Fourteenth Amendment, Section One of the United States Constitution.

2. Whether evidence of statements made by the appellant under examination after arrest, without being advised of rights to remain silent and right to counsel, introduced in the trial court, was in violation of appellant's rights as guaranteed under the Sixth Amendment of the United States Constitution.

3. Whether information from a known gambler that he had gambled with appellant in the past and

observations by police of appellant going to various public places and returning to his home was sufficient probable cause for the issuance of a search warrant and subsequent search and seizure as protected by the Fourteenth Amendment, Section One of the United States Constitution.

STATEMENT OF FACTS

On July 22, 1967, C. R. Weast, a member of the Vice Squad of the Virginia Beach Police Department, appeared before Alvin L. Rodgers, Justice of the Peace for the City of Virginia Beach and made affidavit for a warrant to search the premises ". . . at or near 4639 Virginia Beach Boulevard . . ." in Virginia Beach in connection with the alleged possession by Herman Becker of ". . . number plays or slips and any paraphernalia used in number plays (and) (or) used in betting on sporting games and any other items used for illegal gambling . . ." The probable cause for the issuance of said warrant being ". . . because information from known gambler and observation by Sgt. Weast and said informant has associated with and gambled with the above subject . . ."

Pursuant to Sergeant Weast's affidavit, the Justice of the Peace issued the search warrant and at approximately twelve-thirty P.M. on the same day, police officers Warren L. Grant, E. G. Casey and C. H. Harris arrived at the appellant's home. Detective Casey went to the rear of the house and Detectives Grant and Harris went to the front and rang the doorbell. Detective Harris testified (Tr-125) that Mr. Becker said "Yeah, what do you want?" Detective Harris informed him they were police officers and Mr. Becker said, "I will be right with you." A minute later they heard the commode flush and the appellant opened the door.

Upon gaining entrance, the search warrant was handed the appellant and the officers made a search of the house. During the search they seized numerous newspapers, baseball and football schedules, newspaper clippings, blank pieces of paper, and a small pocket telephone directory. The officers testified that they did not know that these items were used for gambling (Tr-175, 183, 193) or that they could be used for purposes other than gambling (Tr-189, 191, 193) or that they didn't know what the items were used for at all (Tr-83, 140, 158, 175, 191, 192). While making their search, the officers testified that the telephone rang approximately forty times in an hour period (Tr-134).

The appellant was then arrested and charged with occupying a place or home and having in his possession books, papers, apparatus or paraphernalia for the purpose of betting or receiving bets, in violation of Title 18.1-319, Code of Virginia, as Amended 1950. He was then taken to the First Precinct of Virginia Beach, where he was questioned by Detective Sergeant Weast.

Prior to trial on the merits, the appellant, by counsel, moved the court to quash the warrant on the grounds that the statute was so vague and indefinite as to violate the appellant's rights guaranteed by the Fourteenth Amendment of the United States Constitution (Tr-4, 5). The Trial Court overruled the motion (Tr-20), to which the appellant excepted (Tr-20), and later raised this federal question by his assignment of error Number One (1), to the Supreme Court of Appeals of Virginia.

Appellant then moved the Trial Court to quash the warrant on the grounds that there was insufficient probable cause for the issuance of the search warrant, thus violating appellant's rights guaranteed under the Fourteenth Amendment of the United States Constitution

(Tr-56). The Trial Court overruled the motion and appellant noted his exception (Tr-75). Appellant raised this federal question in his assignment of error Number Five (5) to the Supreme Court of Virginia.

During the trial on the merits, the Commonwealth, through testimony of Detective Weast, introduced evidence of statements made by appellant after his arrest (Tr-166, 170). Appellant, by counsel, objected to this testimony (Tr-166) and the Trial Court overruled the objection on the grounds that this was a misdemeanor case and that appellant had no right to be advised of counsel or to remain silent (Tr-169). Appellant, by counsel, noted his exception (Tr-170) and by assignment of error Number Fourteen (14) to the Supreme Court of Virginia.

PRESENTATION OF SUBSTANTIAL GROUNDS

Appellant understands that one of the purposes of this Statement is to prevent frivolous appeals. As stated in the case of *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549, the Court should follow a "policy of strict necessity in disposing of constitutional issues." The Court has listed a series of rules to be followed in determining whether constitutional questions were sufficiently substantial as to require plenary consideration, they being:

(A) constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings;

(B) in advance of the necessity of deciding them;

(C) in broader terms than are required by the precise facts to which the ruling is to be applied;

(D) if the record presents some other ground upon which the case may be disposed of;

(E) at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits;

(F) or if a construction of the statute is fairly possible by which the question may be avoided.

It is the appellant's contention that the questions here presented are not barred by any of the above rules. The Supreme Court of Appeals of Virginia, in denying appellant's Writ of Error, refused to decide the federal questions. It merely upheld the Trial Court's ruling. No Virginia case can be found where the statute under which appellant was charged has been interpreted.

In *Peacock* v. *Commonwealth,* 200 Va. 464, the Court cited the case of *Mundy Motor Lines* v. *DuPont,* 199 Va. 933, at pages 937 and 938, where the following was quoted with approval:

> "If the terms in which it (a statute) is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative."

In the instant case, not only is the statute vague to the appellant, but it was also vague to the police officers who searched and seized items from the appellant's home. Throughout their testimony (Tr-83, 104, 110, 112, 140) the officers stated that the items seized pursuant to this statute and introduced into evidence had no meaning to them.

The appellant's contention that he was entitled to be advised of his rights to counsel and the right to remain silent certainly deserves plenary consideration. The Sixth Amendment of the United States Constitution provides, in fact, that ". . . In all criminal prosecution . . ." the accused shall enjoy the right to counsel. The appellant was definitely charged, convicted and sentenced under a criminal statute. The question, therefore, of whether an individual shall be deprived of his liberty and property without right to assistance of counsel is definitely substantial.

The question of whether there was probable cause for the issuance of the search warrant is also substantial. In the recent case of *Riggan* v. *Virginia,* 384 U.S. 152, the Supreme Court of the United States decided this very same question in reversing the Virginia Supreme Court. Thus, where the personal liberty of the appellant and the privacy of his home and papers are in danger, and where he has exhausted all state remedies to protect those rights, it is certainly not a frivolous question to ask the Supreme Court of the United States to determine whether those rights have been violated.

Respectfully submitted,

HERMAN W. BECKER,
Appellant

WILLIAM E. CULVERHOUSE and
GARLAND M. LAYTON
Attorneys for Herman W. Becker
P. O. Box 5211, Bayside Station
Virginia Beach, Virginia

APPENDIX

ORDER

IN THE SUPREME COURT OF APPEALS HELD AT THE SUPREME COURT OF APPEALS BUILDING IN THE CITY OF RICHMOND ON WEDNESDAY, THE 24th DAY OF APRIL, 1968.

The petition of Herman Becker for a writ of error and supersedeas to a judgment rendered by the Circuit Court of the City of Virginia Beach on the 15th day of November, 1967, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Teste:

(s)H. G. TURNER

Clerk